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Abad Arena Juara Sdn Bhd v Rajesh a/l Jaikishan

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO N-04(NCVC)(W)-659–12 OF 2018
HAMID SULTAN, HANIPAH FARIKULLAH AND KAMALUDIN MD SAID JJCA
25 SEPTEMBER 2019

C

Civil Procedure — Pleadings — Intitulement — Respondent claimed via originating summons for delivery of vacant possession and double rental — Respondent relied on tenancy agreement — Failure to intitule relevant provision of law applicable — Whether respondent's originating summons ought to have been dismissed for non-compliance of the Rules of Court 2012 — Rules of Court 2012 O 7 r 3(1)

D

Contract — Tenancy agreement — Claim for vacant possession and double rental by respondent — Whether respondent entitled to double rental

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The appellant appealed against the decision of the learned High Court judge who refused to set aside the order for vacant possession and double rental against the respondent ordered by the sessions court pursuant to originating summons. The respondent bought the land through public auction and made final payment on 12 September 2017. The appellant occupied the land on a tenancy agreement with previous owner of the land. When the respondent paid fully for the auction on 12 September 2017, there was no tenancy agreement between the appellant and the respondent. However, the appellant refused to give vacant possession because it contended that there was still a tenancy in existence. In the respondent's originating summons, the respondent claimed amongst others, for vacant possession of a land from the appellant, double rental from date of auction of the land till the appellant vacated the same and consequential order. The High Court in this regard, found that there was no reason to disturb the finding of the sessions court judge. The respondent had validly brought the land through public auction and therefore the appellant must give vacant possession of the land and pay double rental. The appellant's appeal was dismissed with costs, hence the present appeal. The issue remaining was only as to double rental and whether the respondent's originating summons ought to have been dismissed for non-compliance of the Rules of Court 2012.

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Held, allowing the appeal with no order as to costs and setting aside the

judgment of the High Court and sessions court subject to appellant's undertaking:

(1) It was important to note in this case that the respondent did not want to recognise the appellant but wanted double rental based on the tenancy agreement with the previous owner. In addition, the respondent in prayer (b) was seeking for RM18,000 as rental and/or alternatively double rental. Such a prayer was not supported by evidence and had no basis in law. Further, the respondent was relying on the tenancy agreement which he did not recognise and that too, without proper intitulement in the originating summons itself. Failure to intitule the relevant provision of the law was bad in law. Lastly, the originating summons did not comply with O 7 r 3(1) of the Rules of Court 2012 (see paras 10–12).

(2) It was a strict requirement of law for the need to comply with the intitulement rule as well as endorsement rule as complained by the appellant. In the event there was non-compliance of the rules, the court must give suitable directions at the case management stage itself. In addition, if a party objected to non-compliance of rules at a late stage or take it as a preliminary objection, the court must order costs against the 'objecting party', but nevertheless direct compliance of the rules. This was one way of ensuring both parties to the proceedings were vigilant and one party did not take the other by surprise by taking preliminary objection at a late stage. In addition, in all circumstances, costs orders must not be excessive as access to justice was a fundamental right guaranteed under our Federal Constitution (see para 14).

(3) Based on the intitulement in the instant case, as owner of the land, the respondent can only get vacant possession and damages if any, if the occupier of the land did not vacate the land upon reasonable notice given according to law. To obtain vacant possession, the relevant Act and/or rules according to specific facts of each case may be s 7 of the Specific Relief Act 1950 and/or O 89 of the Rules of Court 2012 or other provisions of the law. The Act or Rules were also not entituled. It was fatal and the court should not proceed with the hearing of the originating summons without appropriate intitulement unless the issue was not brought to the attention of the court. The court must endeavor to ensure compliance of Rules. Condoning non-compliance by the court for expediency when no party would be affected was permissible and otherwise, the court had a duty to ensure compliance of the Rules of Court and/or other provisions of the law (see para 16).

(4) On the facts of the case, the court was in total agreement with the appellant's submission and accepted the candidness to vacate the premise on 14 October 2019 with full settlement of rental (see para 21).

[Bahasa Malaysia summary

Perayu membuat rayuan terhadap keputusan hakim Mahkamah Tinggi yang bijaksana yang enggan mengetepikan perintah untuk milikan kosong dan sewaan berganda terhadap responden sepertimana yang diperintahkan oleh mahkamah sesyen menurut saman pemula. Responden membeli tanah melalui bidaan awam dan membuat bayaran terakhir pada 12 September 2017. Perayu menduduki tanah atas perjanjian penyewaan dengan pemilik tanah sebelumnya. Apabila responden membuat bayaran penuh untuk bidaan pada 12 September 2017, tiada perjanjian penyewaan di antara perayu dan responden. Walau bagaimanapun, perayu tidak mahu memberikan milikan kosong kerana mengatakan bahawa masih terdapat sewaan yang masih wujud. Di dalam saman pemula responden, responden menuntut antara lainnya, untuk milikan kosong tanah daripada perayu sewaan berganda daripada tarikh bidaan tanah sehingga perayu mengosongkan yang sama dan perintah berbangkit. Mahkamah Tinggi berhubung dengan perkara ini, menjumpai bahawa tiada sebab untuk mengganggu penemuan hakim mahkamah sesyen. Responden telah dengan sah membeli tanah melalui bidaan awam dan oleh itu, perayu mestilah memberikan milikan kosong atas tanah dan membayar sewaan berganda. Rayuan perayu ditolak dengan kos, oleh itu rayuan ini. Isu yang tinggal hanyalah atas sewaan berganda dan sama ada saman pemula responden sepatutnya ditolak untuk ketidakpatuhan Kaedah-Kaedah Mahkamah 2012.

Diputuskan, membenarkan rayuan tanpa perintah terhadap kos dan mengetepikan penghakiman Mahkamah Tinggi dan mahkamah sesyen tertakluk kepada aku janji perayu:

(1) Ia adalah penting untuk diberi perhatian di dalam kes ini bahawa responden tidak mahu mengiktiraf perayu tetapi mahukan sewaan berganda berdasarkan perjanjian penyewaan dengan pemilik sebelumnya. Tambahan pula, responden di permohonan (b) telah meminta untuk RM18,000 sebagai sewaan dan/atau secara alternatifnya sewaan berganda. Permohonan seperti ini tidak disokong oleh keterangan dan tiada asas undang-undang. Selanjutnya, responden bergantung pada perjanjian penyewaan yang mana tidak diiktiraf dan itu juga, tanpa tajuk di saman pemula sendiri. Kegagalan untuk meletakkan tajuk atas peruntukan undang-undang yang relevan adalah salah di sisi undang-undang. Akhirnya, saman pemula tidak mengikut A 7 k 3(1) Kaedah-Kaedah Mahkamah 2012 (lihat perenggan 10–12).

(2) Ia adalah keperluan undang-undang untuk memenuhi peraturan undang-undang utama dan juga pengesahan peraturan-peraturan seperti mana yang diadukan oleh perayu. Dalam keadaan ketidakpatuhan undang-undang, mahkamah mestilah memberikan arahan-arahan yang bersesuaian pada masa pengurusan kes sendiri. Tambahan pula, jika ada pihak membantah ketidakpatuhan undang-undang di peringkat yang

lewat atau mengambilnya sebagai bantahan awal, mahkamah mesti membuat perintah terhadap kos atas 'pihak yang membantah', tetapi walaupun begitu membuat arahan untuk pematuhan peraturan-peraturan. Ini adalah salah satu cara untuk memastikan kedua-dua pihak kepada prosiding-prosiding berhati-hati dan satu pihak tidak membuat kejutan ke atas yang lain dengan membuat bantahan awal di peringkat yang lewat. Tambahan pula, dalam semua keadaan, perintah terhadap kos-kos mestilah tidak melebih-lebih kerana akses kepada keadilan adalah hak asas yang dijamin di bawah Perlembagaan Persekutuan (lihat perenggan 14).

(3) Berdasarkan tajuk di kes ini, sebagai pemilik tanah, responden hanya boleh mendapat milikan kosong dan kerugian-kerugian jika ada, jika pemilik tanah tidak memberikan milikan kosong tanah dengan memberikan notis yang wajar mengikut undang-undang. Untuk mendapat milikan kosong, Akta relevan dan/atau undang-undang mengikut fakta-fakta khusus setiap kes mungkin s 7 Akta Spesifik Relif dan/atau A 89 Kaedah-Kaedah Mahkamah 2012 atau peruntukan-peruntukan lain undang-undang. Akta tersebut atau undang-undang juga diberikan tajuk. Ia adalah fatal dan mahkamah tidak sewajarnya meneruskan dengan pendengaran saman pemula tanpa tajuk yang sesuai melainkan isu tersebut tidak dibawa ke perhatian mahkamah. Mahkamah mesti berusaha untuk memastikan kepatuhan undang-undang. Membenarkan ketidakpatuhan oleh mahkamah untuk kesesuaian apabila tiada pihak akan terkesan adalah dibenarkan dan sebaliknya, mahkamah mempunyai tugasan untuk memastikan kepatuhan Kaedah-Kaedah Mahkamah dan/atau peruntukan lain undang-undang (lihat perenggan 16).

(4) Atas fakta-fakta kes, mahkamah adalah dengan persetujuan penuh dengan hujahan perayu dan menerima kejujuran untuk mengosongkan premis pada 14 Oktober 2019 dengan penyelesaian penuh sewaan (lihat perenggan 21).]

Notes

For cases on intitulement, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 7543–7546.

For cases on tenancy agreement in general, see 3(4) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 7481–7504.

Cases referred to

Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd [1991] 1 MLJ 404, SC (distd)

Ling Khee Ming v Ling Shew Kue @ Ling Chai Yuen & Anor [2018] MLJU 1059, CA (refd)

A *Pegawai Pengurus Pilihanraya v Streram Sinnasamy & Ors* [2019] 1 LNS 589 (refd)
Pendaftar Cap Dagangan Malaysia v Adabi Consumer Industries Sdn Bhd & Anor [2019] 2 MLJ 168; [2019] 6 CLJ 315, CA (refd)
B *Quality Project Industries Sdn Bhd & Anor v Ban Lian New Second Hand Auto Suply Co Sdn Bhd* [2016] MLJU 1230, HC (distd)
Voo Min En & Ors v Leong Chung Fatt [1982] 2 MLJ 241, FC (distd)

Legislation referred to

C Federal Constitution
Rules of Court 2012 O 7 r 3(1), O 89
Specific Relief Act 1950 s 7

Appeal from: Appeal No NA-12BNCVC-18–04 of 2018 (High Court, Seremban)
D

RS Sodhi (Sodhi Chambers) for the appellant.
Ramasamy Amaippan (Lim Ram & Assoc) for the respondent.

E **Hamid Sultan JCA (delivering judgment of the court):**

[1] The appellant/defendant appeals against the decision of learned High Court judge who refused to set aside the order for vacant possession and double rental against the plaintiff ordered by the sessions court pursuant to the
F originating summons ('OS').

PRELIMINARY

[2] This matter was fixed for hearing before us on 11 July 2019. The
G appellant had filed his submission on 3 July 2019 as per usual directions of registrar during case management of the file in the Court of Appeal. However, the respondent/plaintiff's counsel did not file submission as per direction. On that date of hearing, we had read the appellant's submission and our preliminary view was the appeal had merit.

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[3] On that day of hearing, we heard the appellant submission, however the respondent counsel requested a short adjournment to file his submission on the grounds he was not well. We allowed the respondent to file the submission by 18 July 2019 and also indicated to the parties to settle the matter amicably as
I the appellant counsel had indicated that his client had no issue in vacating the premise.

[4] The issue remaining is only as to double rental and whether the respondent's OS ought to have been dismissed for non-compliance of the rules.

The matter was fixed for continued hearing on 26 July 2019. Subsequently, the respondent's counsel had filed his submission on 18 July 2019.

[5] On the date of the second hearing, the coram took the view that no further submission was needed and we delivered the decision on 26 July 2019. Our decision was that the appellant had to give vacant possession on the agreed date as well as full rental and not double rental, with no order as to costs. As we were delivering the judgment, the learned counsel for the respondent in a disruptive manner stood up to say that 'my client wants double rental'. We had no choice but to reprimand the counsel severely and inform him of the court's ethics, and the need to obey the order of the court. It would have been different if the counsel had politely approached the court to say that he would like to make a further submission on the issue of double rental. If such an oral application had been made, we would have ordinarily entertained the application for at least a few minutes. This was not the case.

[6] To put it mildly: (a) the respondent's counsel did not file the submission in time; (b) sought an adjournment when we have already decided in the absence of the respondent filing the submission on the strength of the appellant's submission that the appeal has merit; (c) we had after granting the adjournment, informed the parties to settle the matter amicably; (d) a settlement was not reached and we delivered our decision after having considered the respondent's late written submission; and (e) the respondent's counsel disrupted when the judgment was delivered. In our view, such conduct should be avoided. Advocates should always maintain 'court decorum' to seek justice according to law and not according to the desire of clients (see *Pegawai Pengurus Pilihanraya v Streram Sinnasamy & Ors* [2019] 1 LNS 589).

BRIEF FACTS AND GROUNDS OF DECISION OF THE HIGH COURT

[7] The brief facts of the case has been placed in a rudimentary manner before us and to save courts time we reproduce it and it read as follows:

> BRIEF FACTS
>
> 1. The plaintiff had bought the land through public auction and made final payment on 12 September 2017.
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> 2. The defendant occupied the land on a tenancy agreement with previous owner of the land.
>
> 3. When the plaintiff paid fully for the auction on 12 September 2017, there was no tenancy agreement between defendant and plaintiff
>
> 4. However, the defendant refused to give vacant possession because it contended that there is still a tenancy in existence.

A

5. *The plaintiff's claim (OS)*:

(a) vacant possession of a land from the defendant; and

(b) double rental from date of auction of the land till the defendant vacates the same and consequential order

B

6. *The High Court judge's finding:*

(a) Defendant contend that there is a tenancy agreement until 14 October 2019

C

(i) this is not true. There is no formal agreement but only defendant's letter written purportedly where the defendant agreed to extend the agreement to 14 October 2019. No prove that the previous owner had accepted this letter and agreed to the extension.

D

(b) the defendant argue that the OS is defective because it does not comply with O 7 r 3(1) of the ROC 2012 as there is no cause of action:

(i) this is not true as the plaintiff had clearly indicated vacant possession of the land as he had bought the same;

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(c) the defendant also argue that the OS's intitulement did not state the law applicable:

(i) the defendant was not mislead by the OS and well aware of the plaintiffs prayers;

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(d) since there is no subsisting tenancy agreement between the plaintiff and defendant, the defendant has no rights whatsoever;

(e) on the issue of double rental, plaintiff is entitled to this as the defendant is still occupying the land without a valid tenancy agreement. This is allowed under s 28(4) of the Civil Law Act;

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(f) the sessions court judge order that the defendant is to pay the utilities bills for the building on the land is fair as the defendant is the one who occupied the building; and

(g) the High Court judge unable to accept the defendant's argument that there is a subsisting agreement as the defendant has paid the rental continuously. However, the fact that there is no extension of the tenancy by any agreement has not proven that the previous owner had agreed to extend the same.

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7. *High Court's decision*:

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No reason to disturb the finding of the session court judge. The plaintiff had validly bought the land through public auction and therefore the defendant must give vacant possession of the land and pay double rental. The defendant's appeal is dismissed with costs.

[8] The respondent/plaintiff's prayer in the OS read as follows:

(a) Bahawa Defendan menyerahkan milikan kosong hartanah yang dikenali sebagai GRN 135469, Lot 17092, Mukim Setul, Daerah Seremban dengan serta merta;

(b) Bahawa Defendan membayar sewa untuk hartanah tersebut sebanyak RM18,000.00 sebulan dan atau sewa dua kali ganda daripada tarikh 16.05.2017 sehingga Defendan mengosongkan tanah tersebut

(c) Bahawa Defendan menjelaskan semua bayaran bagi utiliti bangunan yang terletak atas tanah tersebut;

(d) Bahawa Defendan menyerahkan hartanah tersebut seperti sediakala, seperti terdapat dalam perjanjian tenansi bertarikh 05.10.2011;

(e) Lain-lain relif sebagaimana yang dianggapkan adil dan patut oleh Mahkamah Yang Mulia ini; dan

(f) kos permohonan ini adalah kos dalam kausa.

[9] The memorandum of appeal read as follows:

1. Hakim Mahkamah Tinggi terkhilaf dari segi undang-undang dan fakta apabila gagal mendapati bahawa responden telah gagal memenuhi kehendak mandatory Aturan 7 Kaedah 3(1) Kaedah Mahkamah 2012 dan Saman Pemula tersebut tidak mendedahkan apa-apa kausa tindakan dan patut ditolak dengan kos.

2. Hakim Mahkamah Tinggi terkhilaf dari segi undang-undang dan fakta apabila gagal mendapati bahawa Mahkamah Sesyen adalah terikat kepada prinsip stare decisis dan terikat kepada keputusan Mahkamah Rayuan Malaysia dalam kes *Saraswathy Devi a/p Nadchatiram v Vijayalakshmi Devi a/p Nadchatiram* [1998] 1 MLJ 89 dan patut menolak Saman Pemula tersebut dengan kos.

3. Hakim Mahkamah Tinggi terkhilaf dari segi undang-undang dan fakta apabila gagal mendapati bahawa Mahkamah Sesyen adalah terikat kepada prinsip stare decisis dan terikat kepada keputusan Mahkamah Rayuan Malaysia dalam kes *Lee Eng Eow (as director of Lee Guat Cheow & Co Sdn Bhd) v Mary Lee (as executrix of the estate of Low Ai Lian) & Ors* [1999] 3 MLJ 481 dan patut menolak Saman Pemula tersebut dengan kos.

4. Hakim Mahkamah Tinggi terkhilaf dari segi undang-undang dan fakta apabila gagal mendapati bahawa Mahkamah Sesyen adalah terikat kepada prinsip stare decisis dan terikat kepada keputusan Mahkamah Tinggi dalam kes *Malayan Banking Berhad lwn Sri Datai Engineering Sdn Bhd* [2006] 7 MLJ 171 dan patut menolak saman pemula tersebut dengan kos.

5. Hakim Mahkamah Tinggi terkhilaf dari segi undang-undang dan fakta apabila gagal mendapati bahawa responden telah gagal menepati Aturan 7 Kaedah 2 (1A) Kaedah Mahkamah 2012 yang mandatori dan atas alasan itu Saman Pemula tersebut patut ditolak/dibatalkan dengan kos.

6. Hakim Mahkamah Tinggi terkhilaf dari segi undang-undang dan fakta apabila gagal mendapati bahawa Mahkamah Sesyen adalah terikat kepada prinsip stare decisis dan adalah terikat dengan keputusan Mahkamah Rayuan Malaysia dalam kes *Cheow Chew Khoon (t/a Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457; [1995] 4 CLJ 127 dan keputusan Mahkamah Rayuan dalam kes *Taman Baru Masai Sdn Bhd v Dindings Corporation Sdn Bhd* [2010] 5 CLJ 83 dan Saman Pemula tersebut patut ditolak dengan kos.

7. Hakim Mahkamah Tinggi terkhilaf dari segi undang-undang dan fakta apabila gagal mendapati bahawa perayu mempunyai satu sewaan premis tersebut sehingga 14-10-2019 berdasarkan dokumen-dokumen kontemporari dan cek-cek sewaan yang dibayar secara 'postdated' dan responden tidak berhak kepada apa-apa sewa dua kali ganda.

8. Hakim Mahkamah Tinggi terkhilaf dari segi undang-undang dan fakta apabila gagal mendapati bahawa responden terikat kepada syarat-syarat jualan 'conditions of sale' di dalam dokumen Peristiharan Jualan khususnya perkara 23 yang berbaca:

> Hartanah yang berjaya dilelong adalah dipercayai dan akan dianggap sebagai perihalkan dengan betul dan dijual tertakluk kepada semua ismen (*easement*), kaveat, tenansi, tanggungan dan hak (jika ada) yang wujud di atas atau terhadapnya yang timbul untuk mentakrif ia masing-masing ...

9. Hakim Mahkamah Tinggi terkhilaf dari segi undang-undang dan fakta apabila gagal mendapati bahawa perintah jualan dan syarat-syarat jualan adalah merupakan perjanjian jual beli di dalam transaksi lelong oleh Makamah dan responden adalah terikat kepada syarat-syarat jualan tersebut.

OBSERVATIONS

[10] What is important to note in this case is that the respondent does not want to recognise that the appellant is a tenant but wants double rental based on the tenancy agreement with the previous owner. That rental was RM5,800.

[11] In addition, the respondent in prayer (b) is seeking RM18,000 as rental and/or alternatively double rental. Such a prayer is not supported by evidence or has any basis in law.

[12] Further, the respondent is relying on the tenancy agreement which he does not recognise and that too without proper intitulement in the OS itself. Failure to intitule the relevant provision of the law is bad in law. Lastly, the OS did not comply with O 7 r 3(1) of the Rules of Court 2012 ('the RC 2012') which read as follows:

3 Contents of originating summons (O 7 r 3)

(1) Every originating summons shall include a statement of the questions on which the plaintiff seeks the determination or direction of the Court or, as the case may be, a concise statement of the relief or remedy claimed in the proceedings begun by the originating summons with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy.

[13] In our view, the learned sessions court judge should have taken note of this grave discrepancies at case management stage itself. The court should have made the necessary orders to regularise the matter for the court to even consider the issue of double rental. The learned High Court judge also did not consider the appellant's complaint according to rule of law and in consequence the integrity of the decision making process itself has been compromised.

[14] We have read the appeal records and the able submissions of the learned counsel. After giving much consideration to the submission of the learned counsel for the respondent, we take the view that the appeal should be allowed as proposed by the learned counsel for the appellant. Our reasons, inter alia, are as follows:

(a) it is a strict requirement of law for the need to comply with the intitulement rule as well as endorsement rule as complained by the appellant. In the event there is non-compliance of the rules, the court must give suitable directions at the case management stage itself. In addition, if a party objects to non-compliance of rules at a late stage or take it as a preliminary objection, the court must order costs against the 'objecting party', but nevertheless direct compliance of rules. This is one way of ensuring both parties to the proceedings are vigilant and one party does not take the other by surprise by taking preliminary objection at a late stage; and

(b) in all circumstances, costs orders must not be excessive as access to justice is a fundamental right guaranteed under our Federal Constitution. This may not be the position in England. In addition, the judicial administration of justice is done through public purse for the benefit of the public. Thus, court orders as to cost must be done with circumspect. Some guidelines as to how the costs orders to be made in the subordinate court has been set out by the Rules Committees. That guideline and its application justly and proportionately should stand as the guideline for all courts. In addition, costs orders in public interest litigation should not be made unless it is one of severe abuse of process. In all cases, cost order should be nominal and not punitive to ensure the litigant is not punished for his counsel's fault. The public should not be deterred to seek justice through courts as access to justice stands as a fundamental guarantee. Judges having taken an oath of office should keep this in mind at all stages of judicial proceedings. The Court of Appeal in the case of *Pendaftar Cap*

Dagangan Malaysia v Adabi Consumer Industries Sdn Bhd & Anor [2019] 2 MLJ 168; [2019] 6 CLJ 315 as well as *Ling Khee Ming v Ling Shew Kue @ Ling Chai Yuen & Anor* [2018] MLJU 1059, have explained the jurisprudence related to costs orders to some extent.

[15] In the instant case, the OS intitulement read as follows:

[DALAM MAHKAMAH SESYEN MALAYA DI SEREMBAN
DALAM NEGERI SEMBILAN DARUL KHUSUS, MALAYSIA

SAMAN PEMULA NO: NA-A54-20-12/2017

Dalam Perkara Jualan Dalam Mahkamah Tinggi di Seremban, Negeri Sembilan dalam Permohonan Perlaksanaan No 38–05–01/2017

Dan

Dalam Perkara Lelongan Awam bertarikh 16.05.2017 Hartanah yang dipegang di bawah Geran No 135469, Lot No 17092, Mukim Setul, Daerah Seremban, Negeri Sembilan

RAJESH A/L JAIKISHAN ... PLAINTIF
[NO K/P: 730805-14-5827]

DAN

ABAD ARENA JUARA SDN BHD
[NO SYARIKAT: 541745-H] ... DEFENDAN]

[16] Based on the intitulement in the instant case, as owner of the land, the respondent can only get vacant possession and damages if any, if the occupier of the land does not vacate the land upon reasonable notice given according to law. To obtain vacant possession, the relevant Act and/or rules according to specific facts of each case may be s 7 of the Specific Relief Act 1950 and/or O 89 of the RC 2012 or other provisions of the law. The Act or Rules were also not intituled. In our view, it is fatal and the court should not proceed with the hearing of the OS without appropriate intitulement unless the issue was not brought to the attention of the court. The court must endeavor to ensure compliance of the Rules. Condoning non-compliance by court for expediency

when no party will be affected is permissible and otherwise, the court has a duty to ensure compliance of the Rules of Court and/or other provisions of the law.

[17] In addition and as a matter of caution, we must say that intitulement issue or endorsement issue cannot be taken for the first time in an appeal. In the instant case, the appellant had raised it in the court below (see *Janab's Key To Civil Procedure* (5th Ed, 2019) — revised by Dato' Mah Weng Kwai and Arun Kasi at pp 3 and 209).

[18] In the instant case, the respondent had purchased the property at an auction subject to all encumbrances. On this point, learned counsel for the appellant submits:

> THE APPELLANT'S TENANCY
>
> 12. The appellant entered into a tenancy agreement dated the 5-10-2011 with the previous Landlord to rent a single storey factory having a postal address No 348 Jalan Nilai 3/11, Kawasan Perindustrian Nilai 3, Negeri Sembilan (said Premises). A copy of the Tenancy Agreement is at pages 60–70 of *Jilid* 2(A).
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> 13. The tenancy was for a period of 3 years with an automatic renewal for a further period of 2 years with the same rental and with an option to renew for a further period of 3 years upon and subject to the same terms and conditions subject to an increase on the rental not more than 5% of the current rental. See page 62 *Jilid* 2(A) last clear.
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> 14. The tenancy has 3 terms:
>
> 14.1 1st terms is from 15-10-2011 until 14-10-2014
>
> 14.2 2nd term is from 15-10-2014 until 14-10-2016 (automatic renewal)
>
> 14.3 3rd term is from 15-10-2016 until 14-10-2019 (option to renew)
>
> 15. By a letter dated the 1-8-2016 the appellant exercised the option to renew the tenancy for the 3rd term. This letter is found at page 163 of *Jilid* 2(A).
>
> 16. The appellant exercised its rights to extend the tenancy period until 14-10-2019 and paid the monthly rentals to the previous landlord by post dated cheques until 14-10-2019. A copy of the cheque details up until 1-9-2019 is at pages 84 *Jilid* 2 (A).
>
> 17. The appellant submits that when the appellant received the Notice of Auction of the said Premises the appellant gave notice to the bank to stop cheque payments from 1-6-2017 to 1-9-2019. A copy of the notice is at pages 165 to *Jilid* 2(A) The respondent purchased the premises at a court auction on or about 16-5-2017.
>
> 18. The appellant has also reissued the monthly rental payments from 1-6-2017 to 1-9-2019 in the respondent's name when the respondent purchased the said premises at the auction and the letter is at page 189 to 190 Jilid 2(A).
>
> 19. It can be seen from the appellant bank statement at pages 150, 152, 156 and 158

A that the appellant has been paying the previous landlord rentals for the 3rd term ie 15-10-2016 until 14-10-2019.

CONDITIONS OF SALE

20. It is the appellant's submission that the respondent is not entitle to vacant
B possession as the respondent purchased the said Premises at an auction subject to the defendant's existing tenancy.

21. The condition of sale is found at page 46 of Jilid 2 (A). The note to the 'Peristiharan Jualan' reads as follows:

C > Nota: Bakal pembeli adalah dinasihatkan agar membuat carian hakmilik secara rasmi di Pejabat Tanah dan memeriksa semua tanggungan, bebanan serta mengenal pasti dengan tepat hartanah tersebut sebelum jualan lelongan dijalankan (See page 47 *Jilid* 2(A)).

22. Item 6 and 23 of the conditions of sale reads:

D

Item 6 (page 50 *Jilid* 2(A))

> 6. Penawar adalah bertanggungjawab untuk mengenal pasti butir hartanah dan memastikan segala tanggungan serta bebanan hartanah adalah tepat.

E Item 23 (page 51 *Jilid* 2(A))

> 23. Hartanah yang berjaya dilelong adalah dipercayai dan akan dianggap sebagai diperihalkan dengan betul dan dijual tertakluk kepada semua ismen (*easement*), kaveat, tenansi, tanggungan dan hak (jika ada) yang wujud di atas atau terhadapnya yang timbul untuk mentakrif ia masing-masing dan tiada kesilapan
F > kenyataan yang salah atau deskripsi yang salah akan membatalkan penjualan dan tiada bayaran ganti-rugi yang akan dibuat.

23. It is clear and unequivocal that the respondent purchased the said Premises subject to the appellant's tenancy. In *Ranjit Singh a/l Jarnail Singh v Malayan Banking Bhd* [2016] 1 MLJ 165, inter alia, held that:

G > The sale takes place in terms of the order for sale made and the condition of sale imposed in accordance with the order and any determination thereunder by the registrar of the court'. In as much as the chargee at whose instance the sale is effected is to be regarded as the vendor, the order for sale and the said conditions of sale are to be regarded as the sale and purchase agreement.

H It was pointed out by learned counsel that the above position was endorsed by the Court of Appeal, in the case of *Mohamed Azmal Noor a/l Naina Mohd Noor v Arab-Malaysian Finance Bhd & Anor* [2003] 4 MLJ 447; [2003] 2 CLJ 505, where Abdul Aziz Mohamad JCA (as he then was) held:

I > In the case of an order for sale of land charged under the National Land Code, VC George J (as he then was) held in *Malayan United Finance Bhd, Johore Bahru v Liew Yet Lan* [1990] 1 MLJ 317 that the order for sale and the conditions of sale were to be regarded as the sale and purchase agreement between the charge as vendor and the purchaser. Likewise I would regard the order for sale and the sale conditions in this case as the sale and purchase

agreement between the respondents and the purchaser.

24. Based on the above authorities the terms of the order for sale and the said conditions of sale are recorded as the sale and purchase agreement between the respondent and the chargee in the auction and the respondent is bound by the terms therein. See also *Santhi a/p Krishnan v Malaysia Building Society Berhad* [2015] MLJU 2116 (Court of Appeal).

25. In *Antonina Marleen Yarendra v Chai Wei Chung* [2017] 4 MLJ 359 had the occasion to consider the legal effect of the conditions of sale in an auction scenario and had this to say:

> The respondent failed to conduct a search on the property until after he had successfully bid at the public auction and made the necessary arrangements for the loan. Under such circumstances, the appellant could not blame the appellant for any damage or loss he claimed to have suffered. It would be reasonable to conclude that he bid for the property knowing of, and despite, the encumbrances, including the appellant's caveat. There were specific provisions, particularly conditions 14 and 16, in the conditions of sale attached to the proclamation of sale, warning that the auction sale was subject to any encumbrances including, as it turned out, the appellant's caveat. Had the respondent conducted the search before making his bid, as he was obliged to do under the clear terms of the proclamation of sale, he would have discovered the existence of the caveat. If he had bid despite knowing of the existence of the caveat, he could not later complain of any damage or loss resulting from or related to the removal of the caveat. In the circumstances, the respondent had clearly disentitled himself to any compensation under s 329(1) of the NLC (see paras 32–24).

26. It is the appellant's submission that the respondent purchased the said premises subject to the rights of the appellant's arising and guaranteed under the terms of the said tenancy and in the circumstances and based upon the trite law and the authorities referred to above, the respondent is not entitled to the prayers sought in the Originating Summons.

CONCLUSION

27. It is the appellant's submission that based upon the above cases and trite law the appellant has a legal contractual right to occupy the said Premises until October 2019 and that the respondent's application for vacant possession is materially flawed and contrary to the authorities cited. The 'conditions of sale' are clearly binding on the respondent in that he purchased the said Premises subject to the tenancy.

28. Wherefore the appellant prays that the appeal be allowed with cost.

[19] The respondent's submission totally ignores relevant part of the submission of the appellant and is anchored on s 28(4) of the Civil Law Act 1956 which read as follows:

> (4)(a) Every tenant holding over after the determination of his tenancy shall be chargeable, at the option of his landlord, with double the amount of his rent until

possession is given up by him or with double the value during the period of detention of the land or premises so detained, whether notice to that effect has been given or not.

[20] In addition, the cases relied upon by the respondent namely: (a) *Voo Min En & Ors v Leong Chung Fatt* [1982] 2 MLJ 241; (b) *Quality Project Industries Sdn Bhd & Anor v Ban Lian New Second Hand Auto Suply Co Sdn Bhd* [2016] MLJU 1230; and (c) *Hotel Ambassador (M) Sdn Bhd v Seapower (M) Sdn Bhd* [1991] 1 MLJ 404; had no relevance to the facts of the case. The present case is challenged on the grounds of non-compliance as well as the terms of the auction. The auction sale in law was a conditional sale as to some issues except as to indefeasibility jurisprudence.

[21] On the facts of the case, we are in total agreement with the appellant's submission and accept the candidness to vacate the premise on 14 October 2019 with full settlement of rental.

[22] For reasons stated above, we made appropriate orders that the appeal is allowed with no order as to costs and we set aside the judgment of the High Court as well as the sessions court subject to the appellant's undertaking. The respondent to refund the monies received in stakeholder's account or to take on account the monthly rental used.

We hereby ordered so.

Appeal allowed with no order as to costs; judgment of High Court and sessions court set aside subject to appellant's undertaking.

Reported by Addibah Adnan